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IN THE

Supreme Court of the United States

October Term, 1967

No. 1018

C. PARKE MASTERSON,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit dated October 3, 1967, affirming the judgment of the United States District Court for the Southern District of New York (Inzer B. Wyatt, D.J.) convicting petitioner of falsifying or causing to be falsified certain invoices or making or causing to be made certain false accounts in relation to a bankruptcy proceeding in violation of 18 USCA 152 and 2.

Opinions Below

The United States Court of Appeals for the Second Circuit (Lumbard and Moore, Circuit Judges, and Bonsal, District Judge) on October 3, 1967, rendered an opinion reported in 383 F.2d 610. Said opinion is set out in Appendix "A", *infra,* at pages A1-A8. Prior to trial, the United States District Court for the Southern District of New York (Canella, D.J.) in an opinion and order dated February 18, 1966, denied petitioner's motion to suppress certain evidence pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure. Said opinion is reported in 251 F. Supp. 937 and set out in Appendix "A", *infra,* at pages A8-A14.

Jurisdiction

1. The judgment of conviction sought to be reviewed is dated March 8, 1967 and was entered the same date. The order denying petitioner's motion to suppress is dated February 18, 1966 and was entered the same date.

2. Petitioner's motion for a rehearing en banc in the United States Court of Appeals for the Second Circuit was denied on October 30, 1967. An order granting petitioner's motion extending his time within which to petition for certiorari was granted by Mr. Justice Harlan upon condition that the petition be filed on December 29, 1967 and further extended to January 5, 1968.

3. The jurisdiction of this Court is invoked pursuant to 28 USCA 1254 (1).

Questions Presented for Review

1. Whether the seizure of evidence by a trustee in bankruptcy, a court appointed official, through trespass, fraud and other improper conduct, without the authority of an order of the district court or the referee in bankruptcy or other process, constitutes an unlawful search and seizure prohibited by the Fourth and Fifth Amendments of the United States Constitution?

2. Whether the Court below in affirming the judgment of conviction contradicted its prior decision in *United States ex rel. De Forte* v. *Mancusi*, 2d Cir. 1967, 379 F. 2d 897?

3. Whether the requirement imposed by the Court below upon petitioner to prove that the unlawful search and seizure involved the security of his property in order to establish his standing to contest the unlawful search and seizure was erroneous in view of the authority of *United States* v. *Jones*, 362 U. S. 257, wherein it was held that a defendant need not show that the security of his property was invaded when doing so would be tantamount to an admission of guilt (362 U. S. at page 263)?

4. Whether the holding by the Court below affirming the judgment of conviction herein that "* * * it would be most inappropriate to defeat the Trustee's clear right to the use and possession of documents of which he has title, merely because a technical trespass accelerated their reduction to possession * * *" constitutes error in view of this Court's holding in footnote "9" of *Mancusi, supra*, that

"* * * an unlawful search cannot be justified on the ground that the evidence seized might have been obtained by other and lawful means"?

5. Whether the Court below affirming the judgment of conviction herein erred in holding that "Appellant has not shown that he was in any way prejudiced by the manner in which they were obtained" although the unlawful search and seizure resulted in the acquisition of evidence upon which he was indicted, convicted, sentenced, fined and disbarred?

6. Whether the panel of this Court affirming the judgment of conviction erred in holding that petitioner had no standing to question the unlawful search and seizure when his offices were unlawfully invaded in view of the holding in *Jones* v. *United States,* 362 U. S. at page 267, that "no just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on the premises when a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him"?

7. Whether the panel of this Court affirming the judgment of conviction and denying standing to petitioner to protest the unlawful search and seizure imposed unnecessary and unjustified strictures and limitations upon the right of privacy protected by the United States Constitution and severely limited the import of the holdings of the Supreme Court in *Weeks* v. *United States,* 232 U. S. 383; *Mapp* v. *Ohio,* 367 U. S. 643; *Camara* v. *Municipal Court,* 35 U. S. Law Week 4517, June 5, 1967; *See* v. *Seattle,* 35 U. S.

Law Week 4522, June 5, 1967; *Warden* v. *Hayden*, 35 U. S. Law Week 4493, May 29, 1967; *Berger* v. *New York*, 35 U. S. Law Week 4619 June 12, 1967, all of which hold that the thrust of the Fourth Amendment is designed to protect the right of privacy whether in a dwelling, an office or a place of business?

8. Whether the failure of the trial court to charge the jury that defendant could not be convicted for causing a false account in bankruptcy or causing a false entry to be made in certain invoices of the debtor in possession constitutes reversible error since the proof adduced at the trial was that persons other than defendant physically made false debtor in possession statement or made entries in invoices alleged to be false?

9. Whether the trial court committed reversible error in denying defendant's motion to set aside the verdict of the jury on the grounds that the evidence was insufficient to sustain defendant's conviction, or, that the conviction cannot be sustained because the evidence was insufficient to support a verdict of guilty.

Constitutional Provisions and Statutes Involved

The constitutional and statutory provisions involved are the Fourth and Fifth Amendments to the United States Constitution, 11 USCA 1 (26) (36), 61, 75, General Order 3; 18 USCA 152, 2d paragraph and 7th paragraph. The pertinent portions of these constitutional provisions and statutes are set forth below:

"ARTICLE IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation.

"11 U. S. C. A. §1 subdivision 26

"(26) 'Referee' shall mean the referee who has jurisdiction of the case or to whom the case has been referred or anyone acting in his stead.

"11 U. S. C. A. §1 subdivision 31

"(31) 'Trustee' shall include all of the trustees and 'receiver' shall include all of the receivers of an estate.

"11 U. S. C. A. §61. Creation of two offices

"The offices of referee and trustee are created. July 1, 1898, c. 541, §33, 30 Stat. 555.

"11 U. S. C. A. §75. Trustees; duties

"(a) Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the es-

tates as expeditiously as is compatible with the best interests of the parties in interest; (2) deposit all money received by them in designated depositories; (3) account for and pay over to the estates under their control all interest received by them upon funds belonging to such estates; (4) disburse money only by check or draft on such depositories; (5) keep records and accounts showing all amounts and items of property received and from what sources, all amounts expended and for what purposes and all items of property disposed of; (6) set apart the bankrupts' exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; (7) examine the bankrupts (a) at the first meetings of creditors or at other meetings specially fixed for that purpose, unless they shall already have been fully examined by the referees, receivers, or creditors, and (b) upon the hearing of objections, if any, to their discharges, unless otherwise ordered by the court; (8) examine all proofs of claim and object to the allowance of such claims as may be improper; (9) oppose at the expense of estates the discharges of bankrupts when they deem it advisable to do so; (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (11) pay dividends within ten days after they are declared by the referees; (12) report to the courts in writing the condition of the estates, the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; (13) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; and (14) lay before the final meetings of the creditors detailed sttaements o fthe administration of the estates.

"(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them

shall be necessary to the validity of their every act concerning the administration of the estate.

"(c) The trustee shall, within ten days after his qualification, record a certified copy of the order approving his bond in the office where conveyances of real estate are recorded in every county where the bankrupt owns real property or an interest therein, not exempt from execution, and pay the fee for such filing. He shall receive a compensation of 50 cents for each copy so filed which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the expenses of administration. July 1, 1898, c. 541, §47, 30 Stat. 557; Feb. 5, 1903, c. 487, §10, 32 Stat. 799; June 25, 1910, c. 412, §8, 36 Stat. 840; June 22, 1938, c. 575, §1, 52 Stat. 860.

"General Order 3. Process

"All process, summonses, and subpoenas, except such as are issued by the Interstate Commerce Commission in the performance of its duties under section 77 of the Act,[1] shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees. As amended Apr. 17, 1933, eff. Apr. 24, 1933; Jan. 16, 1939, eff. Feb. 13, 1939. 18 U. S. C. A. 152, 2d Par.:

"Whoever, after the filing of a bankruptcy proceed- false oath or account in or relating to any bankruptcy proceeding' ";

"and the 7th Par.:

' "Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, multilates, falsifies or makes a false entry in any document affecting or relating to the affairs of the bankrupt' ";

1. 11 U. S. C. A. §205.

Statement of the Case

Petitioner was indicted on March 12, 1965 by a Grand Jury in an indictment containing 13 counts. Counts "1" through "9", inclusive, charged petitioner with violating 18 USCA 152 and 2 on specific dates between the period commencing September 11, 1962 and ending October 14, 1963, of knowingly and fraudulently making and causing to be made an account in bankruptcy proceedings which was false in that it overstated the sales and accounts receivable of Twin Lock, Inc., a bankrupt California corporation. In counts "10" through "12", petitioner was charged with knowingly and fraudulently falsifying an entry made in invoices on February 7, 1963 and May 20, 1963. Count "13" charged petitioner and the former co-defendant, Joseph Lavorata, with conspiring to commit offenses in violation of 18 USCA 152 and part of said conspiracy consisted of causing the accountant for Twin Lock, Inc., to make certain false counts by falsifying or causing to be falsified certain entry and documents affecting the property and affairs of the bankrupt corporation by causing fictitious entry to be on invoices and its books showing fictitious sales. Petitioner pleaded not guilty to the counts of the aforesaid indictment.

Since the year 1956 the former co-defendant, Joseph Lavorata, was the principal stockholder in two corporations both known as Twin Lock, Inc., organized respectively under the laws of Delaware and the laws of California. All management, financial and policy decisions were made by the board of directors of the Delaware corporation while

manufacturing, sales and performance in general was conducted by the California corporation. For a time prior to January 19, 1961, petitioner, C. Parke Masterson, was an officer, director and stockholder of said corporations. His stockholdings were contingent upon his continuance as a director of the corporations.

After encountering certain difficulties both corporations filed petitions for reorganization under Chapter XI of the Bankruptcy Laws in the United District Court for the Southern District of New York. Prior to the filing of these petitions, petitioner resigned as an officer and director of these corporations and was required to and did surrender his shares of stock. The petition for reorganization was signed by Carl Lavorata, as president of the petitioning corporations. The purpose of filing these petitions was to enable the corporations to pursue and enforce its rights against certain individuals who fraudulently sold them certain patents.

Following the filing of the petitions for reorganization the district court appointed the former co-defendant, Joseph Lavorata, as managing agent of the corporate debtors in possession in New York City. The bankruptcy court also appointed an accounting firm for the purpose of reporting to it the affairs of the petitioning corporations. These accountants examined the books and records of said corporations which were maintained in the offices of these corporations in New York City. Thereafter said accountants issued monthly reports and statements based upon the books and records maintained in the New York Offices of these corporations. No funds could be disbursed by the corporations unless checks were signed by both Joseph

Lavorata and one, Rita Mayer, an officer of the petitioning corporations who was also a principal government witness during the trial.

Following the filing of the petition the debtor in possession continued to conduct its business under the general supervision of the referee in bankruptcy. Its manufacturing was conducted in California and a small office was maintained in New York City for the purpose of attending to the clerical affairs of these corporations. A plan of reorganization was submitted to the creditors of the corporations which was initially accepted by a majority of the creditors and at the last moment, one creditor withdrew its consent. As a result the corporations were adjudicated a bankrupt on December 24, 1963.

On January 9, 1964, the documents upon which the indictment herein and prosecution is predicated were removed from desks and locked cabinets in the offices of petitioner by the trustee in bankruptcy and the accountants appointed by the referee in bankruptcy. They entered petitioner's offices without a warrant, court order, subpoena or any other lawful process and seized the books and records which form the basis of the indictment. In the district court the Government did not contest the facts of the unlawful search and seizure. It merely contended that the prosecuting arm of Government was not bound by the manner in which a representative of the trustee in bankruptcy secured possession of the records in question.

In the district court, Judge Cannella found that the trustee's actions were improper and his conduct in obtaining the records "* * * amounted to a trespass * * *". Ulti-

mately, these records were delivered to the United States Attorney for the Southern District of New York and presented to the Grand Jury. The evidence upon which the indictment and prosecution which followed are predicated upon the records which are the fruit of the unlawful search and seizure described above.

At the outset of the trial the prosecution against Joseph Lavorata was severed. Count 13 charging the conspiracy, and counts 1 and 2 charging substantive crimes were dismissed following the close of the Government's case. On March 8, 1967, a judgment convicting petitioner was entered after a verdict of guilty was rendered by a jury following a trial from November 29, 1966 through December 2, 1966. The judgment of conviction sentenced petitioner to one year imprisonment on counts 3 through 12 inclusive, said sentences to run concurrently and fined petitioner $1,000.00 on each of the counts remaining in the indictment for a total fine amounting to $10,000.00. The prison sentence was suspended.

Not only was the evidence upon which petitioner's conviction was based illegally obtained it was insufficient to sustain a conviction. All that the prosecution proved was that petitioner was a former officer, director and stockholder, of the bankrupt corporations, who resigned long prior to the date of the acts alleged in the indictment, and that the corporations involved occupied space in petitioner's law offices. Not only was the testimony of the two principal prosecutions materially in contradiction, but the prosecution witness who testified that she typed certain of the invoices in question could not testify which, if any, false

invoices petitioner dictated to her. Consequently, no evidenec was adduced connecting petitioner with any false invoice or false debtor in possession statement. In essence, petitioner was convicted only upon proof that he was a former officer, director or stockholder of the bankrupt corporations and that the latter occupied space in his law suite.

Reasons for Granting the Writ

The issues presented by this petition are of fundamental constitutional importance some of which have not been passed upon before by this Court. Implicit in these issues is the scope and extent of the protection afforded by the Fourth Amendment against unreasonable search and seizures. Specifically, one such issue is whether a trustee in bankruptcy is free under the Constitution to trespass into the offices of an individual without process, warrant or court order and seize evidence which may be used against a defendant in a criminal proceeding, or, whether a trustee in bankruptcy's conduct is circumscribed by the Fourth Amendment.

Considerations of public importance warrant granting the writ. In denying petitioner's motion to suppress the illegally seized evidence, the district court, although finding the search and seizure was effected by the trustee through trespass, fraud but without process of any kind, severely limited the applicability of the Fourth Amendment by holding that a trustee in bankruptcy is a private party "* * * not within the exclusionary mandate of the Fourth Amendment". The district court's decision overlooked the development of the body of law from *Boyd* v. *United States,*

116 U. S. 616 (1886) to *Mapp* v. *Ohio,* 367 U. S. 643 (1961) which have repeatedly held that the Fourth and Fifth Amendments "apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life" (*Mapp* v. *Ohio, supra,* p. 646).

However, in affirming the judgment of conviction the Court of Appeals did not decide whether a trustee in bankruptcy is or is not within the exclusionary mandate of the Fourth Amendment. Rather it held that it was not required to decide that issue since it concluded that petitioner had no standing under Rule 41 (e) of the Federal Rules of Criminal Procedure to question the illegal search and seizure. The Court of Appeals decision, however, conflicts and is inconsistent with its prior decision dated June 28, 1967 in *United States ex rel. De Forte* v. *Mancusi,* 379, F. 2d, 897 and the decisions of this Court in *United States* v. *Jones,* 362 U. S. 257; *Weeks* v. *United States,* 232 U. S. 383; *Mapp* v. *Ohio, supra; Camara* v. *Municipal Court,* 18 L. Ed. 2d 930; *See* v. *Seattle,* 18 L. Ed. 2d 943; *Berger* v. *New York,* 388 U. S. 41; *Warden* v. *Hayden,* 387 U. S. 294; *Katz* v. *United States,* 36 Law Week 4080, decided December 18, 1967, all of which hold that the Fourth Amendment protects the right of privacy and that such protection extends to people and not places (*Katz* v. *United States, supra,* p. 4081).

POINT I

The Fourth and Fifth Amendments of the United States Constitution prohibit the seizure and ultimate use of books or records obtained by a trustee in bankruptcy through trespass, fraud and without process or judicial order.

The evidence upon which the prosecution proceeded came from books and records which were unlawfully and improperly seized from petitioner's law offices where said books, papers and records were kept. The district court agreed that the trustee in bankruptcy trespassed, without warrant or order, to seize the records but held that an unlawful search and seizure did not take place because a trustee in bankruptcy is a private person not within the exclusionary mandate of the Fourth Amendment.

In holding that evidence obtained by search and seizure in violation of the Constitution could not be used this Court reiterated that the Fourth and Fifth Amendments exclusionary rule is designed to close courtroom doors "to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against the very same unlawful conduct * * *" (*Mapp* v. *Ohio, supra,* p. 655) in order to bar "the invasion of his indefeasible right of personal security, personal liberty and private property * * *" (*Mapp* v. *Ohio, supra,* p. 616).

No distinction exists between seizures effected by the prosecuting arm of government or by some other branch. By holding that a trustee in bankruptcy is not with the exclusionary mandate of the Fourth Amendment the dis-

trict court committed error. No branch of the government is exempt from the command of the Fourth Amendment (*Nelson* v. *United States,* D.C., 1953, 208 F. 2d 505, 513, cert. den. 74 S. Ct. 48). There the Court of Appeals reversed a conviction based upon evidence obtained by an employee of a congressional investigating committee holding as follows:

> "The Fourth Amendment exempts no branch of the federal government from the commandment that 'the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *'. This constitutional guarantee applies with equal force to executive, legislative, and judicial action. Courts and committees have the right to require answers to questions. But neither may exert this power to extort assent to invasions of homes and to seizures of private papers. Assent so exerted is no substitute for lawful process".

These authorities clearly show that no basis whatsoever exists in support of holding that a search and seizure by a trustee in bankruptcy by fraud and trespass is the act of a private person (*Hurd* v. *Hodge,* 334 U. S. 24, 34 (1948)).

The office of trustee in bankruptcy was created by Act of Congress (11 U.S.C.A. 61); a trustee is defined by Act of Congress (11 U.S.C.A. 1 (31)); a trustee is authorized to conduct the business of a bankrupt by Act of Congress (11 U.S.C.A. 11 (a) (5)); pass upon trustees' final accounts (11 U.S.C.A. 11 (a) (7)); approve the appointment of trustees (11 U.S.C.A. (a) (17)); and a trustee is authorized by Act of Congress to collect and reduce to money the

property of the estate for which they act as trustee "under the direction of the court" (11 U.S.C.A. 75 (a) (1)). A trustee in bankruptcy is the creature of Congress whose conduct is regulated by public law and whose acts are subject to regulation and control by bankruptcy courts. Furthermore a trustee is without power to seize records without the prior approval of the referee in bankruptcy since General Order 3 under Title 11 of the United States Code provides that "all process, summonses, and subpoenas * * * shall issue out of the court, under the seal thereof * * *". The trustee was statutorily without power to seize these records without process. Such acts by the trustee are a species of lawless governmental activity which are proscribed by the Fourth Amendment.

In executing his duties the trustee in bankruptcy is a governmental official carrying out a public function to achieve a publicly desired end. The object of the bankruptcy laws is to benefit creditors by making all of the means of a bankrupt available to their payment. *Gochenour* v. *Cleveland Terminals Building,* 6th Cir., 118 F. 2d 89 (1941). The system created by the bankruptcy laws is to place a bankrupt's property under the control of the court for the purpose of determining his status and thus sell his assets and distribute his estate. *West* v. *Empire Life Insurance Co.,* 242 F. 605 (1917). It is the duty of the courts to carry these purposes into effect. *In re Blount,* 142 F. 263 (1906). As respects the Social Security Act, Chapter 7 of Title 42, a trustee in bankruptcy is an officer of the Bankruptcy Court and is not an employee of the bankrupt. *Gagne* v. *Brush,* 30 F. Supp. 714 (1940). A trustee in bankruptcy is an officer of the court and fully under its control.

Freeman Coal Mining Corp. v. *Burton,* 1945, 380 Ill. 604, cert. den. 325 U. S. 859. A trustee is an adjunct of the court, performing a public function to bring about the ends sought by legislation enacted by Congress. He is a federal official carrying out a federal function. No rationale exists to support the district court's conclusion that "* * * the trustee, while deriving his power from the District Court, serves for the benefit of the creditors. His situation is not unlike that of an attorney who, while an officer of the court, certainly cannot bind the federal government by any errant conduct on his part".

It is therefore clear beyond controversy that the trustee in bankruptcy is a public official. In seizing the subject records by the invasion of and trespass upon the offices of the appellant, the trustee engaged in conduct barred by the Fourth and Fifth Amendments to the Constitution. Under the authority beginning with *Boyd* v. *United States, supra, to Mapp* v. *Ohio, supra,* evidence so seized by the trustee should have been suppressed and barred from use in the prosecution of this petitioner.

POINT II

The Court of Appeals erred in holding that petitioner was without standing to contest the unlawful search and seizure and in doing so reached a conclusion conflicting with its own prior decision and decisions of this Court.

Implicit in the Court of Appeals' holding that petitioner was not aggrieved by the unlawful search and seizure is the bitter irony of his having been indicted, tried, convicted, sentenced, fined and disbarred as the result of the unlawful search and seizure. In affirming the judgment of conviction the Court of Appeals decided in a manner contrary to its own prior decisions and also the decisions of this Court.

The decision of the Court of Appeals in the case at bar directly conflicts with its prior decision dated June 28, 1967 entitled *United States ex rel. De Forte* v. *Mancusi*, 379 F. 2d 897. The facts at bar strikingly parallel the facts of *Mancusi, supra.* De Forte was convicted in the state courts upon evidence consisting of books and records concededly belonging to his employee, a labor union, which were seized from the offices of the union without a search warrant by representatives of the District Attorney of Nassau County. After his conviction was affirmed by the highest state court De Forte moved the federal district court for a writ of habeas corpus. The district court's denial of the writ was reversed by the Court of Appeals which held that the documentary evidence upon which De Forte's conviction was based was illegally seized in violation of the Fourth Amendment and therefore could not be used at the trial. The deci-

sion in *Mancusi, supra,* seems sufficiently controlling and in point so as to have warranted a reversal of Masterson's conviction. The conflict in the Second Circuit between the *Masterson* decision and *Mancusi, supra,* is sufficiently compelling to warrant review by this Court.

The requirement imposed by the Court of Appeals upon petitioner to prove that the search and seizure involved the security of his property was erroneous in view of the authority of *Mancusi, supra,* where the records, held to have been unlawfully seized, did not belong to the defendant but to his employer. Furthermore, that requirement was erroneous in view of the authority of *United States* v. *Jones,* 362 U. S. 257, 263, where it was held that a defendant need not show that the security of his property was involved by a search and seizure when doing so would constitute an admission of guilt. Here, allegedly forged or counterfeit records of bankrupt corporations were involved. If petitioner were required to prove that the property subject of the search and seizure was his he could not avail himself of a motion to suppress without making an inculpatory admission. Petitioner's right to seek the suppression of evidence seized in violation of his constitutional rights under the Fourth Amendment should not be coupled with the requirement that he waive his rights under the Fifth Amendment prohibition against self-incrimination.

The holding by the Court of Appeals that "* * * it would be most inappropriate to defeat the Trustee's clear right to the use and possession of documents of which he has title, merely because a technical trespass accelerated their reduction to possession * * *" constitutes error in

view of the Court of Appeals holding in footnote "9" of *Mancusi, supra,* that "* * * an unlawful search cannot be justified on the ground that the evidence seized might have been obtained by other and lawful means * * *." "Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello* v. *United States,* 269 U. S. 20, 33, for the Constitution requires that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *." *Wong Sun* v. *United States,* 371 U. S. 471, 481-482". (*Katz* v. *United States,* 36 Law Week 4080, 4082.)

The holding in *Katz, supra,* that the Fourth Amendment is violated by a search and seizure which involves the invasion of privacy even though no trespass or physical penetration took place is germane here. The thrust of the Fourth Amendment is directed to the protection of privacy, which is the right to be left alone, and protects individuals in their homes, offices, places of business and other areas accessible to the public where the individual involved may desire privacy. Consequently, the trustee's acquisition of evidence by an invasion of petitioner's offices without a warrant, court order or other authority, violated the Fourth Amendment. The use of evidence obtained by an intrusion of petitioner's privacy warrants review by this Court.

The Court of Appeals erred in holding that petitioner had no standing to question the unlawful search and seizure when it was his offices which were unlawfully invaded. In *Jones* v. *United States, supra,* at page 267, this Court held that "no just interest of the Government in the effective

and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on the premises when a search occurs may challenge its legality by way of a motion to suppress when its fruits are to be used against him''. Since the premises unlawfully searched belonged to petitioner, he undoubtedly was legitimately on these premises. Unquestionably, the evidence obtained as the result of the unlawful search was proposed to be used against him. Consequently, petitioner under the authority of *Jones* v. *United States, supra,* had standing to challenge the legality of the search. The denial to him of standing by the Court of Appeals constitutes reversible error.

The ultimate effect of the Court of Appeals decision denying standing to appellant to protest the unlawful search and seizure imposed unnecessary and unjustified strictures and limitations upon the right of privacy protected by the United States Constitution and severely limited the import of the many decisions of this Court holding that the Fourth Amendment was designed to protect the right of privacy. Review of the decision below should be ordered so as to reconcile its conflict with the decision of this Court.

POINT III

The district court did not adequately instruct the jury that the petitioner could not be convicted of making a false debtor in possession statement or making false entries in invoices since the record clearly establishes that persons other than petitioner did so.

The district court did not adequately charge the jury that petitioner could not be convicted of physically making the false debtor in possession statements or physically making false entries in invoices. Since the proof clearly established that persons other than petitioner physically made the false debtor in possession statements and false entries in invoices. A charge to that effect was in order.

The same error was committed by the district court respecting those portions of the indictment charging petitioner with making or causing to be made false entries in invoices (Counts 10 through 12). Government witness Mayer testified that it was she or her successor who typed or prepared the invoices. Consequently petitioner could not conceivably be convicted of physically making the false entries in question nor was the question whether he did so properly before the jury for consideration.

Prejudicial error was committed because the physical making aspect of the indictment was not withdrawn from the jury by the Court below by a proper instruction. A judge's instructions to a jury must reasonably relate to the factual situation of the case (*U. S.* v. *Salliey*, 4th Cir., 1966, 360 F. 2d 699). Instructions to the jury must not include material matter not established by the evidence

(*Smith* v. *U. S.*, 6th Cir., 1956, 230 F. 2d 935, 939; *U. S.* v. *Balodimas*, 7th Cir., 1949, 177 F. 2d 485), and must not be equivocal or misleading (*Ballenbach* v. *U. S.*, 1945, 326 U. S. 607, 613, 614). In other words a case must be correctly charged to a jury and failure to give an instruction essential to a correct understanding of the case constitutes prejudicial error. (*Thompson* v. *U. S.*, 5th Cir., 1957, 272 F. 2d 919; *Moore* v. *U. S.*, 5th Cir., 1966, 356 F. 2d 39, 43; *U. S.* v. *Garguilo*, 2nd Cir., 1962, 310 F. 2d 249; *Milanovich* v. *U. S.*, 1960, 365 U. S. 551, 554-5.) A jury of one's peers "is supposed to safeguard our institution of fair trial by measuring impartiality but of what value is an open mind, if it does not know with clear deliberation, the issues upon which it is to pass judgment?" (*Williams* v. *U. S.*, D. C., 1942, 131 F. 2d 21, 23).

The jury should have been permitted to consider only one issue and that is whether the petitioner was guilty of causing false debtor in possession statements to be made or causing false entries in invoices to be made as distinguished from the actual making thereof. By giving the jury both the issues of making and causing to be made the jury was undoubtedly confused. Had the jury been instructed properly the verdict would have well been otherwise.

Furthermore, when the error in the charge is so fundamental as not to submit to the jury the essential ingredients of the offense on which conviction could rest this Court is empowered to note the error on its own motion (*Screws* v. *U. S.*, 1945, 325 U. S. 91).

POINT IV

The evidence was insufficient to establish defendant's guilt beyond a reasonable doubt.

Any appraisal of the Government's case must be made with the *caveat* that the record is entirely barren of proof that the petitioner physically made the allegedly false debtor in possession statements (Counts 2 through 9) or the allegedly false invoices (Counts 10 through 12). The jury was entitled only to consider whether petitioner caused false debtor in possession statements to be made or whether petitioner caused false entries to be made in invoices. Mrs. Mayer did not testify that petitioner dictated any of said invoices. Her testimony was that petitioner dictated some invoices but she could not identify any invoices which may have been dictated by him. Of greater importance is that she could not identify the invoices relied upon by the Government as the basis of the indictment as having been dictated by petitioner.

Assuming, *arguendo,* that the debtor in possession statements offered by the prosecution in support of Counts 2 through 9 of the indictment were false and the invoices offered by the prosecution in support of Counts 10 through 12 of the indictment contained false entries, the testimony offered by the Government through its principal witnesses, Zarett, Ford and Mayer, as well as the grand jury testimony of the petitioner, was insufficient to connect the petitioner with the commission of the alleged crimes.

The testimony of witness Mayer was relied upon exclusively by the Government to prove that petitioner dic-

tated false invoices. However her testimony in no way proved this crucial fact.

Mrs. Mayer could not testify that petitioner dictated any false invoices to her. When Mrs. Mayer testified she had before her Government's Exhibit 4, a folder containing hundreds of invoices allegedly typed in the Twin Lock offices in New York, both during and after the time that she was employed, which included the 22 allegedly false invoices. Mrs. Mayer could not tell the court and jury which invoices petitioner allegedly dictated when asked to do so. Being unable to describe any invoice petitioner was not linked with any allegedly false invoice which served as the basis of this indictment. No evidentiary basis existed to support the jury's verdict implicit in which is a finding that petitioner caused false invoices to be made.

Mayer's and Zarett's testimony was contradictory. From Mayer testimony was elicited that Masterson consciously avoided Zarett's presence at the offices of Twin Lock because he instructed the witness never to state to Zarett where he was or whether he telephoned the office. She testified that Masterson instructed her not to tell Zarett that he was calling the office if Masterson telephoned the office while Zarett was present. Mrs. Mayer also testified that most of the time when Mr. Zarett was present at the office of Twin Lock she was there by herself. By this testimony the Government sought to impress the jury that Masterson sought to avoid the accountant who audited Twin Lock's invoices in order to report to the referee in bankruptcy.

Zarett's testimony was diametrically opposed to Mayer's. Zarett testified that on each occasion when present in Twin Lock's offices and after he extracted data from its records he would confer with Mr. Masterson with respect thereto. This testimony was apparently offered to show Masterson's involvement as a principal in the affairs of Twin Lock.

Because the testimony of these witnesses was contradictory it follows that one misstated the truth. This warrants a rejection of their testimony. Consequently no evidence exists to establish petitioner as a principal of Twin Lock.

To prove that the debtor in possession statements (Government Exhibit 1) were false it was necessary for the Government to show that a false invoice was a factor which led to and was included in their composition. The prosecution failed in this respect and did not provide any evidentiary link between any allegedly false invoice and any allegedly false debtor in possession statement. This omission constitutes a fatal flaw in the Government's case.

Proof of the absence of the vital link between false invoices and false debtor in possession statements is a chart submitted by the Government to the jury as an illustration of the theory of its case. Since that chart was neither evidence nor an exhibit marked for identification, no evidentiary basis exists in the record to connect false invoices with false debtor in possession statements.

No proof whatsoever was offered by the prosecution to prove that petitioner stood to financially or otherwise gain

by the commission or perpetration of the crimes charged in the indictment.

There can be no question that petitioner neither held no financial interest in Twin Lock nor received any remuneration or other gain from the acts charged in the indictment.

The dearth of evidence establishing motive and the lack of evidence even permitting speculation concerning motive completely negates the existence of guilt or any inference of guilt.

Evidence placing the petitioner at the scene of a crime or placing defendant in the vicinity of the place of the crime or showing a relationship between petitioner and co-defendant is insufficient to establish guilt. Proof of the existence of a scheme to defraud or the perpetration of a crime is insufficient to convict. (*U. S.* v. *Gardner,* 7th Cir. 1948, 171 F. 2d 753; *Wolf* v. *U. S.,* 4th Cir. 1916, 238 F. 902; *U. S.* v. *Morley,* 7th Cir. 1938, 99 F. 2d 683, 685.) More is needed than petitioner's mere presence or association with the location of an alleged crime. Neither probabilities inferred by the evidence nor the imagination of a prosecutor is sufficient to establish guilt.

In *Wolf* v. *United States, supra,* the Court of Appeals reversed the conviction of Sam Wolf for violations of the bankruptcy act wherein Sam Wolf was associated in business with his brother, Ben Wolf and Sam Wolf was president of the company and Ben Wolf its secretary and treasurer. There the government's proof was that Sam Wolf was president of the bankrupt company and visited

the premises of the bankrupt from time to time. The opinion of the court reads as follows:

> "But moral probability, however strong, cannot take the place of legal evidence, and inferences which the jury may draw in a case like this must be based upon facts which of themselves tend to establish the guilt of the accused. In our judgment, such a basis is not found in the case here presented."

Further in the opinion, the court, at page 906, holds as follows:

> "As already said, the only evidence against Sam Wolf is the fact that he was president of the company and more or less often visited the store. That might be enough in a civil proceeding to make him responsible for the acts of his brother, but it is not enough, we are persuaded, to support the inference that he committed a crime of 'knowingly and fraudulently' concealing property belonging to the bankrupt estate. The 'proof created by the law' is not overcome by evidence of facts which are not plainly inconsistent with innocence. To hold otherwise is to assume, as the Government contends, that, because Sam Wolf was president and came to the store now and then, he not only might have known and ought to have known, but that he must have known what his brother was doing. In our judgment the latter assumption is clearly unwarranted and it therefore results that the verdict against him rests in reality upon plausible conjecture and not upon proof of incriminating facts."

The reasoning in *Wolf, supra,* is germane here. An element proven in *Wolf, supra,* that defendant was president is absent here. Nevertheless the prosecution urged that it may be assumed that Masterson, although not an officer,

director or stockholder of the bankrupt concern at the time of the events complained of, was a principal or entrepreneur of that firm and that assumption leads to further assumption that it was he who committed the crimes charged. A conviction may not be founded upon inference based upon inference.

> "An inference of criminality must rest on something more substantial than the imagination of a prosecuting attorney or a trier of the facts." (*U. S.* v. *Gardner, supra,* p. 756.)

The evidence necessary to link a defendant with a crime may not be based upon probability but must establish the truth of the fact to a reasonable moral certainty. (See *Arine* v. *U. S.*, 9th Cir. 1926, 10 F. 2d 778, 780, citing *Commonwealth* v. *Webster,* 5 Cush. 295, 320.) Further expression of the rule necessary to connect a defendant with a crime is stated in *U. S.* v. *Litberg,* 7th Cir. 1949, 175 F.2d 20 at page 21, as follows:

> "In U. S. v. Tatcher, 3d Cir. 131 F.2d 1002, 1003, the Court reversing a conviction based on inference stated: *'To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt.'* "

The synthesis of a chain of events from equivocal facts is not sufficient to sustain a conviction (*U. S.* v. *Wapnick,* 202 F. Supp. 712, 716).

Examination of the authorities shows clearly that in many cases where the evidence was much stronger than in the case at Bar, convictions were set aside. In *U. S.* v.

Litberg, supra, a conviction of passing counterfeit federal reserve notes was set aside upon a holding that mere passing of counterfeited bills is not sufficient to show knowledge on the part of defendant that they were counterfeit and this reversal took place even though the Government offered evidence that the defendant there lit a cigar with a counterfeit five dollar bill. In *U. S.* v. *Gardner, supra,* a conviction was reversed for causing a stolen motor vehicle to be transported in interstate commerce and causing certain forged and counterfeited checks to be transported in interstate commerce when all that was shown by the prosecution was the participation of the defendant in some manner in the transaction which gave rise to the charges made against him. In *Glasser* v. *U. S.,* 315 U. S. 60, the conviction of defendant, a former Assistant U. S. Attorney, for conspiracy to defraud the U. S. was reversed by the Supreme Court. The defendant, Glasser, as an assistant prosecutor, was in charge of the prosecution of liquor cases in the Federal Courts and he was charged with accepting money from defendants and others in connection with the "fixing of liquor cases". The *quantum* of evidence against Glasser was recited by Mr. Justice Murphy on p. 73 of his opinion as follows:

> "Glasser has red hair, and the statements made by Kretske were that he would have to see 'Red', or send the money over to 'Red-head', etc., in connection with 'fixing' cases."

The Supreme Court held that the coincidence between the co-conspirators' statements concerning the redhead and the color of the defendant's hair was not sufficient to sustain a conviction. In *U. S.* v. *Wapnick, supra,* which

was a prosecution for transporting motor vehicles in interstate commerce with the knowledge that they were stolen, a motion to set aside the verdict convicting the defendant, Robert Ezersky, was granted. Ezersky was an automobile dealer who at the request of certain co-defendants physically completed forms required by the New York State Motor Vehicle Bureau reciting the name and address of the dealer and purchaser and also the dealer's source of ownership. The evidence also established that Ezersky as a used car dealer had in his possession a book of the above-described forms. The plan in the case was that the perpetrators would purchase a wrecked car, steal a corresponding car, transfer the identification plates from the wrecked to the stolen car and then sell the stolen car as though it was the repaired car. To sell the car, it was necessary to establish a chain of title and in this respect Ezersky was called upon to complete the forms described above. The proof firmly established that Ezersky completed the necessary forms. The question involved is whether the completion of the forms by Ezersky was sufficient to establish knowledge on his part that the vehicles were stolen. The court held the mere completion of the form in question insufficient to establish knowledge on the part of Ezersky that the motor vehicles were stolen and such evidence was inadequate to connect him with the crime.

The cases cited above, which set aside convictions, involved proof of acts by the defendants therein which placed them considerably closer to the commission of the crimes charged than petitioner. Petitioner's being an officer is insufficient to convict him. However he was not an officer at the time of the acts alleged in the indictment. Petitioner's

presence in the place of business was insufficient to convict (*U. S.* v. *Wolf, supra*) nor was his possession of the false invoices sufficient to convict and neither was proven here (*U. S.* v. *Litberg, supra*). The coincidence between the bankrupt's presence in petitioner's offices is not sufficient to convict (*Glasser* v. *U. S., supra*). Moreover, the petitioner's physical making of a false document is not sufficient to establish knowledge on his part that it was false (*U. S.* v. *Wapnick, supra*), and the proof of the case at Bar affirmatively established that petitioner did not physically make any of the documents supporting the indictment.

Yet, despite the lack of evidence here, the jury convicted this petitioner. The prosecution's proof was totally deficient and insufficient.

Conclusion

Certain of the questions raised by this petition are of fundamental national importance. Involved is the scope and extent of the protection afforded individuals by the Fourth and Fifth Amendments. Particularly, one such issue is whether evidence seized by a trustee in bankruptcy, a creature of Congress and an arm of the judiciary, by trespass, fraud and without a search warrant may be used in a criminal prosecution. In addition, this petition deals with the conflict within the Second Circuit between its affirmance of the judgment of conviction herein and its prior decision in *United States ex rel. De Forte* v. *Mancusi, supra,* and also the conflict in the decision of the Second Circuit af-

firming petitioner's conviction with decisions of this Court. The latter conflict is of national significance, since it appears that the decisions of the Second Circuit seek to limit the import of the decisions of this Court as they heave dealt with the applicability of the Fourth and Fifth Amendment to searches and seizures. It is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

JOSEPH GOLDBERG
Attorney for Petitioner

APPENDIX A

Opinion of Court of Appeals

MOORE, *Circuit Judge*:

Appellant was convicted of falsifying or causing to be falsified certain invoices and of making or causing to be made certain false accounts in relation to the bankruptcy proceedings of Twin Lock, Inc. in violation of 18 U. S. C. §§152, 2.[1] The major issues on appeal concern the sufficiency of the evidence and whether the invoices in question should have been excluded from evidence as a product of an illegal search and seizure.

Appellant, a lawyer, was the president of Twin Lock until shortly before January 19, 1961, when Twin Lock filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the Bankruptcy Act. 11 U. S. C. §§701 et seq. Appellant's association with Twin Lock did not terminate with

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1. Section 152 provides in relevant part:

"Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

"* * *

"Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently * * * falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt * * *

"* * *

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

his resignation of the presidency, however, as he continued to render legal services to the corporation. Subsequent to the filing of the petition, the Bankruptcy Court permitted Twin Lock to be operated by debtors in possession, see 11 U. S. C. §742, but required the posting of bonds to secure creditors. Debtor-in-possession financial statements were required to be submitted to the Referee in Bankruptcy periodically. On December 24, 1963, the corporation was adjudged a bankrupt and the debtor-in-possession period was ended.

At the trial, it developed that several of the periodic financial statements were false as they were based in part on invoices reporting sales that never took place. The effect of the false invoices was to swell the sales figures of the corporation, thus improving its apparent financial condition and causing a reduction of the amount of the bonds required by the Bankruptcy Court for the debtors to remain in possession. Appellant argues that there was insufficient evidence to connect him with any of the false invoices. A brief review of the testimony of certain witnesses demonstrates that this contention is without merit.

Ira H. Zarett, a certified public accountant associated with the firm designated by the Referee to submit the statements of Twin Lock's finances, testified that the statements in question had been prepared by him on the basis of invoices he examined at Twin Lock's office in New York City. He further testified that he dealt principally with appellant when visiting the office and discussed each financial statement with appellant, reviewing with him the sales figures. Zarett stated that the invoices in Government Exhibit 4

(including the ones alleged to have been false) were taken into account in preparing the financial statements.

Mrs. Rita Mayer, secretary at the Twin Lock office in New York City, testified that during the relevant period she typed the invoices for Twin Lock and that the information for these invoices came from the following three sources: (1) directly from Twin Lock customers, (2) from Lee Ford, Twin Lock's manufacturing representative in California where the company had its plant, and (3) from appellant. Mrs. Mayer was unable to determine from which of the three sources the information had come for specific invoices in Government Exhibit 4. However, Lee Ford testified that his records showed that he had never shipped out any of the material shown on the Exhibit 4 invoices and had not furnished the information for them, and numerous Twin Lock customers, listed on the invoices as purchasers, testified that a large number of the invoices, including all involved in the counts on which appellant was convicted, showed merchandise which was never received and that all the invoices save one were entirely fictitious and not shown anywhere on their records. The logical conclusion to be drawn from the testimony of the above witnesses, and the conclusion apparently drawn by the jury, is that the information for the false invoices typed by Mrs. Mayer must have come from appellant, the other two sources being excluded. Thus, it is not fatal to the Government's case, as appellant strenuously argues, that Mrs. Mayer was unable to testify directly as to the source of information for each invoice. The evidence was clearly sufficent for the jury to conclude from the testimony of all the witnesses that appellant was the source of the false information.

Appendix A

We now turn to appellant's search and seizure claim. Twin Lock had apparently opened its office at 10 Columbus Circle, New York City in 1958—at that time appellant had his law office elsewhere—but in 1961 appellant took over the lease *in toto* for use as his law office. Twin Lock was permitted, however, to use a desk and some filing cabinets in the outer room of the suite, although it contributed no rent. Mrs. Mayer and a Twin Lock salesman used this space regularly as did one Joseph Lavorata, Twin Lock's managing agent during the debtor-in-possession period. The corporate records were kept in the filing cabinets.

On January 9, 1964, after Twin Lock had been adjudged a bankrupt, an associate of the Trustee in Bankruptcy together with Mr. Zarett, representing the Referee, entered the premises and took the corporate records against appellant's wishes.[2] Prior to the trial, appellant moved to suppress the invoices—seized as part of the records—on the grounds that the Trustee's representative had trespassed on appellant's premises, making the invoices a product of an illegal search and seizure in violation of appellant's Fourth Amendment rights. Judge Cannella denied the motion on the ground that even if the records had been illegally seized, they should not be suppressed in a criminal trial as the Trustee is not a law enforcement agent. At trial, when appellant objected to the introduction of the invoices in evidence, the trial court, after hearing testimony in the absence of the jury concerning the circumstances of the taking of the records, followed Judge Cannella's ruling and allowed the invoices into evidence.

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2. Although appellant was apparently not present when the records were taken, he had successfully turned away the Trustee's associate earlier in the day.

We believe that both judges properly admitted the invoices into evidence. However, we do not reach the question of whether the records, which were found by the district court to be illegally seized by representatives of the Trustee in Bankruptcy are excludable in a criminal trial, because we find that appellant, under the circumstances of this case, has not discharged his burden of persuading the court below that he has standing to challenge the legality of this seizure. Both judges below who passed upon this question assumed that since the records were seized from appellant's premises he is a person "aggrieved" by the search, even though the records were corporate property. To qualify as an "aggrieved person" within Rule 41(e), one must be a "victim" of the search or seizure, "one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." The purpose of the rule is to protect against invasion of privacy and the security of property. *Jones* v. *United States*, 362 U. S. 257, 261 (1960). See *United States ex rel. DeForte* v. *Mancusi*, 379 F. 2d 897 (2 Cir. June 28, 1967). The appellant failed to show either that the search was directed against him or that it invaded the security of his property.

It is clear that the purpose of the seizure of the records was to enable the Trustee to ascertain the financial position of the bankrupt, Twin Lock. We cannot say that the search was for the purpose of obtaining evidence for use against appellant, when the record shows that prior to examination of these records no criminal proceedings had been com-

menced and there is no showing that such proceedings were contemplated by the Trustee. Therefore this case is unlike *United States* v. *Birrell*, 242 F. Supp. 191 (1965).

Nor was the security of appellant's property or his right to privacy in any way threatened or impaired. It is undisputed that the seized materials were the property of the bankrupt and that the Trustee was entitled to their possession. 11 U.S.C. §110. While the court below found that the Trustee's representatives committed a trespass in entering appellant's office to remove the records, appellant was at most a bailee with respect to Twin Lock's records. A bailor is privileged peacefully to go upon the property of a bailee in order to recover possession of his property. 1 Restatement of Torts, Second §183. The Trustee's representatives did no more than a private person could lawfully do under similar circumstances. It cannot be said that the security of appellant's property was disturbed by an action which any private person similarly situated could lawfully have undertaken.

Further, it would be most inappropriate to defeat the Trustee's clear right to the use and possession of documents of which he has title, merely because a technical trespass accelerated their reduction to possession. The parties agree that the same documents could have been obtained by the Trustee in another manner at a later date. Appellant has not shown that he was in any way prejudiced by the manner in which they were obtained.

On a motion to suppress under Rule 41(e) of the Federal Rules of Criminal Procedure, the burden is on the defendant to prove all facts necessary to sustain the mo-

tion. *Murray* v. *United States*, 333 F. 2d 409 (10 Cir. 1964), *vacated on other grounds*, 380 U. S. 527 (1965); *United States* v. *Poppitt*, 227 F. Supp. 73 (D. C. Del. 1964); 5 Orfield, Criminal Procedure Under the Federal Rules §41.54 (1967). Appellant has failed to show facts sufficient to give him standing to challenge admission of the invoices. Therefore it was proper to admit them at trial.

Appellant also contends that the trial court erred in not instructing the jury that he could not be convicted of physically making false debtor-in-possession statements as the record established that others physically prepared the statements. As appellant took no exception to the charge he cannot complain now. At any rate, the jury could hardly have been confused as there was never any suggestion that appellant had physically prepared any documents, only that he had provided false information which was reflected in certain documents.

Appellant objects that it was error for the trial court to allow his Grand Jury testimony into evidence at the trial. As his testimony before the Grand Jury was given after he was fully advised of his rights, including being told the nature of the investigation and that he was a subject of the investigation, there was no error in introducing it at the trial.

We have examined appellant's other points and find them to be without merit.

Affirmed.

Appendix A

Opinion by Judge Cannella

Motion by the defendants, C. Parke Masterson and Joseph Lavorata, for an order directing the suppression and return of evidence, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, is denied.

On March 12, 1965, both defendants were indicted by the grand jury in indictment 65 Cr. 224, containing thirteen counts. Counts 1 through 9, inclusive, charge the defendants with knowingly and fraudulently overstating the sales and accounts receivable, in the profit and loss statement of Twin Lock Inc., a corporation in bankruptcy. 18 U.S.C. §§152, 2. In counts 10 through 12, the defendants are charged with knowingly and fraudulently falsifying entries on invoices dated February 7, 1963 and May 20, 1963. 18 U.S.C. §§152, 2. Count 13 charges the existence of a conspiracy between Masterson and Lavorata to violate the provisions of 18 U.S.C. §152.

After pleading not guilty, and after an adjudication of their motion for a bill of particulars was rendered by Judge Palmieri, the defendants changed their counsel and thereafter moved to suppress as evidence corporate records of Twin Lock, Inc. which allegedly were improperly taken by representatives of the Trustee in Bankruptcy of that corporation. The motion was initially made to Judge Tyler on July 26, 1965, who adjourned the matter for one week to permit the movant to cure the obvious hearsay deficiencies in the supporting affidavits. On August 3, 1965 the motion was argued before Judge MacMahon, who on September 14, 1965, similarly denied the motion without prejudice to a renewal "upon affidavits

stating facts by persons having knowledge of them." The motion was renewed and is presently before this court.

Preliminarily, a recitation of the facts preceding the seizure of the corporate records would appear to be prerequisite to an adequate understanding of the issues presented. In this regard, the government contends, *inter alia,* that the present affidavits suffer from the same deficiency, viz. the lack of personal knowledge on the part of the affiants as to many of the stated facts, as the affidavits submitted to Judges Tyler and MacMahon. The merit to this position need not be explored in view of this court's ultmate determination that, even accepting the defendants' rendition of the facts in toto, they are not entitled to the requested relief.[1]

In 1956, the defendant Lavorata purchased stock in Twin Lock, Inc., a Delaware corporation formed for the purpose of acquiring a patented electronic device utilized by missile manufacturers. The purchase was effected through an intermediary, Twinlock, Inc., a California corporation wholly owned by the Delaware corporation. The manufacturing operations of this device were confined to the California plant of Twinlock, Inc., located in Los Angeles while the major managerial and policy decisions were formulated by the Board of Directors of the parent company. The California corporation maintained an eastern office in New York City.

1. The government does not contend that any of the facts are otherwise. Although it has continually asserted the hearsay objection to the affidavits, its basic position is unrelated to any factual quibble. The government's position, simply stated, is that the manner in which a representative of the trustee in bankruptcy secured possession of the records is not binding on the prosecuting arm of the government. See particularly the last paragraph of p. 7, Government's Affidavit in Opposition to the Motion.

Appendix A

Sometime after the sale was consummated it was learned that the sellers of the patent were not the true owners thereof. The anticipated difficulties from this discovery led the corporations to file a petition on January 19, 1961 in the District Court for the Southern District of New York for reorganization under Chapter XI of the Bankruptcy Law. Defendant Lavorata, a major investor in the corporations, was appointed the managing agent for the debtors in possession.

The New York office of the California corporation was transferred in September of 1961, from its prior quarters to a section in the law offices of the defendant Masterson, at 10 Columbus Circle, New York City. Invoices, billings and related records were maintained in California, while informational copies were forwarded to the New York office. These copies were examined monthly at Masterson's office by the court appointed accountants for the debtors in possession, Leon I. Radin & Co.

At a time not designated in the papers, the corporations were adjudicated bankrupt. Thereafter, on January 9, 1964, Mr. Seymour Kehlmann, a law associate of the Trustee in Bankruptcy, Murray Sylvester and whose law firm Blum, Haimoff, Gersen & Szabad, is the Trustee's attorney, appeared at Masterson's office and indicated that he had a court order directing the turnover of the corporate records. Masterson told Kehlmann that if he had such an order he should present it to the attorney for the bankrupts, Mr. Moses Polakoff. Masterson and Kehlmann then left Masterson's office. A few hours later, Kehlmann and a representative of the Referee-designated accountant, Leon I. Radin & Co., returned, entered Masterson's office and removed all of the corporate records.

This conduct amounted to a trespass, since it was done without the approval of Lavorata or Masterson, and without a court order. Twelve days after the taking of the records, the Trustee petitioned the Referee in Bankruptcy for a turnover order which was granted on February 3, 1964.[2]

Assuming that Kehlmann was acting on the Trustee's behalf, and accepting as correct the facts surrounding the seizure as herein depicted, the Trustee's action was obviously improper.

Considering the indictment once again, the charge is that the reports prepared by the accountants for the debtors in possession are inaccurate and that the cause of the inaccuracies is directly traceable to the unlawful acts of the defendants in falsifying the corporate records. Does the Trustee's impropriety, bearing in mind that he is an officer of the court, preclude the government from introducing the seized materials into evidence at the trial of the action?[3]

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2. There is no dispute as to the Trustee's ultimate right to the records of the corporate bankrupt. On January 3, 1964, six days prior to the seizure, Masterson, representing Lavorata, who was confined because of illness, indicated his desire for an expeditious turnover of the records. The order was not granted due to the absence of an appropriate corporate official before the Referee at that time. After the seizure, Polakoff, on behalf of Masterson, made what proved to be an abortive suggestion to the Trustee that the seized items be returned, an inventory taken by Masterson, followed by a final turnover of the records to the Trustee.

3. This question presupposes the existence of "standing" on the part of the defendants to object to the manner in which the records were obtained. Since the items were seized from Masterson's premises, at a time when Lavorata had access and control of the records, the defendants are persons "aggrieved" by the search. This is true notwithstanding the facts that the records were corporate property and their seizure was an incidental result, rather than the primary

Appendix A

The fourth amendment "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures * * *" does not mention the admission or exclusion of evidence secured in violation of the constitutional guarantee. The common law rule is that the admissibility of evidence is uneffected by the manner in which it is obtained. Wigmore, Evidence, §2183, McNaughten Ed.) However, the Supreme Court in Weeks v. United States, 232 U. S. 383 (1914) held that the implicit mandate of the fourth amendment requires that evidence illegally obtained by federal agents be suppressed in federal prosecutions. Such exclusions are unrelated to considerations of the reliability of the evidence. The objective is to discourage police misconduct. See, e.g., Linkletter v. Walker, 381 U. S. 618 (1965); Silverman v. United States, 365 U. S. 505, 511 (1961); Burdeau v. McDowell, 256 U. S. 465 (1921). The defendants in the case at bar insist that all governmental misconduct in this regard, and not merely the transgressions of the police, must be discouraged via the suppression of evidence. Thus it is argued that the actions of the Trustee, who is an official of the United States District Court, should bind the prosecuting branch of the government.

It is certainly true that the scope of the exclusionary rule first formulated in *Weeks* has expanded considerably

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purpose, of the search. See, Jones v. United States, 362 U. S. 257, 267 (1960); Weeks v. United States, 232 U. S. 383, 393 (1914); United States v. Birrell, 242 F. Supp. 191 (S. D. N. Y. 1965); United States v. Pisano, 191 F. Supp. 861 (S. D. N. Y. 1961); United States v. Antonelli Fireworks Co., 53 F. Supp. 870, 873 (W. D. N. Y. 1943), aff'd 155 F. 2d 631 (2d Cir. 1946) ("* * * the lawful possession by Antonelli of documents and property, either his own or the corporation's was entitled to protection against unreasonable search and seizure.")

since 1914. In 1949, in Wolfe v. Colorado, 338 U. S. 25, the court held that the fourth amendment guarantee was applicable to the states through the due process clause of the fourteenth amendment. However, the *Wolfe* court added that the states need not exclude illegally seized evidence as long as other sanctions were imposed to discourage police misconduct. Prior to series of cases culminating in Elkins v. United States, 364 U. S. 206 (1960), state police were considered as private parties relative to federal prosecutions, thereby permitting state officers to turn over on a "silver platter" improperly obtained evidence to federal officers for use in federal courts. See Sobel, The Law of Search and Seizure, pp. 7-8, Kings County Criminal Bar Ass'n. This divergence between state and federal practice was remedied by the decision in Mapp v. Ohio, 367 U. S. 343 (1961). Evidence obtained by an illegal search and seizure is now equally unavailable to a prosecutor in state and federal courts.

However, although the scope of the rule has expanded, its purpose remains unchanged, viz. the discouragement of misconduct by enforcement officials. Therefore, evidence illegally secured by a private party, in which the government did not directly or indirectly participate, is not suppressable. See e.g. United States v. Goldberg, 330 F. 2d 30 (3rd Cir.), cert. denied, 377 U. S. 953 (1964); Burdeau v. McDowell, supra. This result necessarily follows from the government's inability to affect the conduct of private parties unconcerned with the prosecution. In the present case the Trustee, while deriving his power from the District Court. serves for the benefit of the creditors. His situation is not unlike that of an attorney who, while an officer of the court, certainly cannot bind the federal government by any errant conduct on his part.

The defendants do not contend that precedence requires that the evidence in this particular case be suppressed. Indeed, the movants state on page 13 of their memorandum in support of the motion that "* * * this Court is now being called upon, in this very *first instance,* to strike down an affront to its judicial authority and dignity. * * *" Emphasis added.

This court finds that the acts of the Trustee, in this particular factual context, are not within the exclusionary mandate of the fourth amendment and the motion to suppress is therefore denied.

So ordered.

Dated: New York, N. Y., February 18, 1966.

JOHN M. CANNELLA
U. S. D. J.

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4. On page 3 of the defendant's memorandum, United States v. Birrell, supra, is correctly cited for the proposition that the present defendants have "standing" to assert the claimed invalidity of the search. On the first page of his affidavit accompanying the moving papers, the defendants' attorney suggests a further relevance of that decision to the instant case, by stating, "the relief requested herein was recently granted in a somewhat similarly-situated case * * * [United States] v. Birrell." No designation of the parallelisms existing between the two cases is offered and a perusal of Judge Wyatt's learned opinion in *Birrell* discloses that the cases are substantially dissimilar. In *Birrell,* a marshal obtained custody of the defendant's records pursuant to a search warrant. Simultaneously with service of the warrant, two other individuals served Birrell's agent, Dunn, with an impounding order issued by a California District Court of Bankruptcy and a subpoena duces tecum issued by the Bankruptcy Court of the Southern District of New York. The search warrant was found not to be predicated on probable cause, the impounding order was jurisdictionally defective, and the government's argument that the marshal's custody was valid under the subpoena, was rejected since that order merely directed Dunn to bring the records with him and testify. The subpoena did not command a delivery of Birrell's records into the Bankruptcy Court. Unlike the instant case, where the Trustee has custody, the marshal improperly obtained that possession, the fruits of the search were suppressed. *Birrell* clearly has no bearing on the present case, except as to the question of "standing".

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1018

C. PARKE MASTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 383 F.2d 610. The opinion of the district court (Pet. App. A8-A14) is reported at 251 F. Supp. 937.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1967. A petition for rehearing was

denied on October 30, 1967. On December 24, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 29. On January 4, 1968, Mr. Justice Harlan granted a further extension to January 5. Both extensions were granted "without prejudice to the Court's consideration of whether this application has been filed in time." The petition was filed on January 15, 1968, and is out of time under Rules 22(2) and 34(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether invoices taken by representatives of a trustee in bankruptcy from file cabinets in petitioner's law office kept in a place set aside for the corporation were properly admitted in evidence.

2. Whether the court's instructions constitute plain error.

3. Whether the evidence was sufficient to support petitioner's conviction for bankruptcy fraud.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on ten counts of bankruptcy fraud, in violation of 18 U.S.C. 152. He was fined $1,000 on each count and sentenced to concurrent

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[1] The transcript of trial ("Tr.") has been filed with the clerk of this Court.

terms of imprisonment for one year, the execution of sentence being suspended and petitioner being placed on probation for three years. The court of appeals affrmed.

On January 19, 1961, Twin Lock, Inc., filed a voluntary petition in bankruptcy pursuant to Chapter 11 of the Bankruptcy Act. The bankruptcy court in New York permitted the company to be operated by debtors in possession (Tr. 27), but required the posting of bonds to secure creditors. An accounting firm, represented by Ira Zarett, was appointed to review the accounts of Twin Lock and to prepare monthly profit and loss schedules for the referee (Tr. 25-26, 36, 76).

Petitioner, a New York attorney who had become president of the corporation in 1958 (Tr. 399), resigned as president shortly after the bankruptcy petition was filed, but continued to perform legal services for the corporation. In October 1961, he assumed the lease on the office space occupied by Twin Lock, and subsequently moved his legal practice there while permitting Twin Lock to carry on its business from an outer room (Tr. 307). On several occasions petitioner furnished the funds required by the referee as additional security for creditors (Tr. 319).

Prior to September 1962, almost all of Twin Lock's business was carried on from its California plant. However, in that month the billing procedures were changed. After shipments had been sent from the California plant pursuant to a purchase order, the packing sheets were sent by the plant manager to Twin Lock's New York City office, where invoices

were prepared and sent to the customers by a secretary, Twin Lock's sole full-time employee in New York; payment was remitted to the New York office (Tr. 229-230). The secretary maintained the invoice files and these were used by Zarett for his preparation of accounting schedules (Tr. 39, 232).

After a number of monthly schedules had been prepared by Zarett, it was discovered that many of the invoices were fraudulent in that they reflected fictitious sales. The effect of these false invoices was to inflate the sales figures, thereby increasing the gain or reducing the deficit on the corporation's monthly profit and loss statements which Zarett prepared and submitted to the referee (Tr. 72). As a result the bankruptcy court was fraudulently induced to reduce the amount of the bonds required for the debtor to remain in possession.

At trial, it was shown that Twin Lock's secretary received the information from which she prepared the invoices from three sources: petitioner, the packing sheets sent by Twin Lock's agent in California, or, occasionally, the customers (Tr. 23). The data on the false invoices could not have come from the customers, however, since they had no knowledge of the transactions (Tr. 105-160). Similarly, the records maintained by the California plant manager indicated that he had not provided the information contained in the false invoices (Tr. 194).

ARGUMENT

1. Prior to trial petitioner moved to suppress certain invoices obtained by Zarett and the attorney for

the trustee from file cabinets which were reserved solely for Twin Lock's use and were situated in the outer room of petitioner's suite of law offices. This motion was denied without a hearing on the ground that action by private individuals is not within the purview of the Fourth Amendment. At trial, petitioner renewed his motion, and Zarett testified that in January 1964, he and an attorney for the trustee in bankruptcy entered the outer office during business hours, identified themselves to Twin Lock's secretary, who admitted them, and proceeded to gather up the records.[2] The trial judge concluded that the ruling on the pretrial motion was correct (Pet. App. A14). The court of appeals agreed that the invoices were properly admitted in evidence, but premised its conclusion on the ground that petitioner lacked standing to object to the seizure of corporate records (Pet. App. A5-A7).

It is clear that the invoices were properly admitted in evidence. Petitioner does not dispute the trustee's title to the invoices.[3] They were kept with petitioner's permission within a perimeter of space leased to him, but in a specific area set aside solely for Twin Lock. The trustee's representatives limited their activities to that part of the office occupied by Twin Lock and

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[2] Petitioner was apparently not present at the time the records were removed. He had turned away the trustee's attorney earlier that day. (Pet. App. A4).

[3] Twelve days after the taking of the records, the trustee petitioned the referee in bankruptcy for a turnover order, which was granted shortly thereafter (Pet. App. A11).

took only the corporate documents belonging to the trustee. In these circumstances, their entry into the outer office of the suite, with the permission of petitioner's secretary, was not an invasion of petitioner's rights.

Even if the conduct of the trustee's representatives in obtaining the corporate papers belonging to the trustee were regarded as a technical trespass, these representatives acted as private individuals,[4] unsupervised by any government agency and unconcerned with the prosecution. The purpose of the rule excluding evidence obtained by an unlawful search is to remove the incentive of government officials to disregard an individual's right of privacy. This purpose would not be served by applying an exclusionary rule in this case where no government agent was involved.[5] *Burdeau* v. *McDowell*, 256 U.S. 465; see *United States* v. *McGuire*, 381 F.2d 306 (C.A. 2), certiorari

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[4] The trustee himself is not a government agent. As the district court pointed out, such a person may derive his power from a court, but he serves for the benefit of creditors, and, like an attorney—also an officer of the court—cannot bind the government by his errant conduct (Pet. App. A13).

[5] *United States ex rel. DeForte* v. *Mancusi*, 379 F.2d 897 (C.A. 2), certiorari granted, Jan. 22, 1968 (No. 844, this Term), relied upon by petitioner, does not support his claim of standing. In that case the Second Circuit deviated from the customary rule and determined that, in the particular circumstances, a union official could object to a post-indictment search by state police agents of the union's one-room headquarters conducted in his presence and over his objections, and the seizure of union records where he had a considerable role in preparation of the records.

denied, January 15, 1968 (O.T. 1967, Nos. 666 Misc., 669 Misc., 670 Misc.).

2. The government did not seek to prove that petitioner personally prepared the false statements. Rather, the prosecution's evidence tended to show that he furnished the false information relied upon by those individuals who prepared the fictitious statements. The court's charge to the jury was tailored to the issues raised at trial. Among his instructions, the trial judge recited the underlying statute (18 U.S.C. 152), the elements of the offense, and the aiding and abetting provisions of 18 U.S.C. 2. Defense counsel did not object to the charge.

Petitioner has isolated a portion of the instructions on the elements of the offense, where the court charged that one violates the statute if he "made or caused to be made" the false statements. He now alleges that this instruction permitted the jury to convict him on a theory not asserted by the government, *i.e.*, that he made the false statements. Realistically, however, it would have been impossible for anyone to have concluded, in light of the evidence presented, that petitioner made the false statements. Moreover, other parts of the charge made it evident that the prime issue was the causal connection between petitioner's acts and the false statements. If the judge had been asked to eliminate the innocuous reference to guilt on the basis of having "made" the statements, he undoubtedly would have done so. There is clearly no basis for the claim that the charge contained plain error. *United States* v. *Mont*, 306 F.2d 412, 417 (C.A. 2),

certiorari denied, 371 U.S. 935; see *United States* v. *Edwards*, 366 F.2d 853, 869 (C.A. 2), certiorari denied *sub nom. United States* v. *Jakob*, 386 U.S. 908.

3. Contrary to petitioner's contention, there was ample evidence to support his conviction. The bankrupt corporation was heavily indebted to him, and he had furnished the funds for indemnity bonds required on occasions when a monthly income statement showed a loss. Since there was no need to supply additional funds if the company's monthly transactions were in the black, petitioner stood to benefit if the schedules submitted to the referee indicated a profit. The testimony of Zarett established that all of the schedules in question were prepared on the basis of information taken from Twin Lock's invoice files.[6] The secretary, who prepared the invoices, testified that the information could have come from three sources, two of which were eliminated by the testimony of Twin Lock's California plant manager and the various purchasing agents of the companies appearing as the purchasers on the false invoices. The logical conclusion, and the one properly reached by the jury, was that the fictitious information came from petitioner.

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[6] Zarett further stated that after preparing the statements, he discussed each one with petitioner, reviewing with him the sales figures (Tr. 71-72, 93, 96).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1968.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1018

C. PARKE MASTERSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A REHEARING

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1018

C. PARKE MASTERSON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A REHEARING

To: *The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States*

Petitioner, C. PARKE MASTERSON, moves this court for a rehearing pursuant to Rule 58.

I.

Statement as to Applications Previously Made.

Petitioner has not heretofore moved this court for a rehearing. The petition herein was filed on January 15, 1968. On March 4, 1968, the petition for certiorari was denied.

II.

Grounds for a Rehearing.

Petitioner herein seeks a rehearing for the reason that his petition for a writ of certiorari involves issues which are the same as those in United States ex rel *DeForte* v. *Mancusi*, No. 844, wherein certiorari was granted on January 22, 1968. Such issue is whether the affirmance of the judgment of conviction by the Second Circuit contradicted its prior decision in United States ex rel *DeForte* v. *Mancusi*, 2d Cir., 1967, 379 F. 2d 897? In the *DeForte case*, supra, the court below held that DeForte had standing to question the search and seizure although the seized records were not his property and that such evidence was illegally seized and could not be used against him during his trial. The facts of the instant petition are virtually identical with those of the *DeForte* case. Here, as in *DeForte*, supra, records were seized without warrant or other lawful process from petitioner's law offices by trespass and the untruthful representation that the records were being taken pursuant to an order issued by the referee in bankruptcy when, in fact, no such order existed. Because the facts and issues in *DeForte*, supra, and the case at bar are in striking parallel and certiorari was granted in *DeForte*, supra, no good reason seems to exist to support denial of the petition for a writ of certiorari.

CONCLUSION

By reason of all of the foregoing it is respectfully requested that the petition for a rehearing be granted and thereupon the petition for certiorari be granted.

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